



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 19 2001

OFFICE OF
SOLID WASTE AND EMERGENCY
RESPONSE

Mr. Leonard Crouse
Director of Captives
Vermont Department of Banking, Insurance,
Securities & Health Care Administration
89 Main Street, Drawer 20
Montpelier, VT 05620

Dear Mr. Crouse:

The Environmental Protection Agency's (EPA's) Office of Inspector General recently issued a report¹ (enclosed) that raised some issues about the use of captive insurance as a mechanism for assuring the closure and post-closure care of hazardous and municipal waste facilities. To appropriately respond to this report, I am requesting your written response to questions about insurance policies issued by captives, particularly pure captives, domiciled in Vermont to assist us in determining whether these policies meet our regulatory requirements.

Background on EPA Regulations

EPA has established regulations to ensure that if an owner or operator of a waste facility is unable or unwilling to close it properly, funds will be available for proper closure and post-closure care. These regulations appear at 40 Code of Federal Regulations (CFR) 258 Subpart G for municipal solid waste landfills, and 40 CFR 264 and 265 Subpart II for hazardous waste facilities. One of the mechanisms that companies can use to comply with the regulations is insurance if the policies comply with the provisions of section 258.74(d), 264.143(e), 264.145(e), 265.143(d), or 265.145(d) of Title 40 of the CFR. For your convenience, I have enclosed copies of these regulations. All of these regulations require that the policy provide for

"RCRA Financial Assurance for Closure and Post-Closure, Audit Report 2001-P-007,"
United States Environmental Protection Agency, Office of Inspector General, March 30, 2001.
Available at <http://www.epa.gov/oigearth/audit/list301/finalreport330.pdf>.

its assignment to the new owner or operator.²

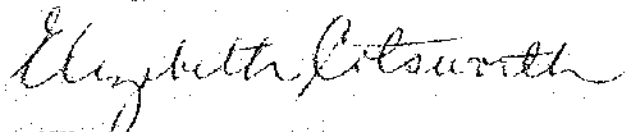
The financial assurance requirements apply to the new owner or operator of a hazardous waste facility if it is sold. While the regulations require that the new owner or operator obtain financial assurance for a hazardous waste facility, the regulations also require that the seller maintain financial assurance until the permitting authority accepts the financial assurance provided by the buyer. (See 40 CFR 270.40(b).) This ensures that there will be no lapse in coverage.

Please Respond to These Questions

1. Under what circumstances can a captive insurance policy covering closure and post-closure for a facility be assigned to a new owner or operator? Is this the same if the captive is a pure captive as opposed to some other type of captive?
2. Does the assignment of a captive insurance policy to a new owner or operator outside of the captive's corporate family require your approval? Is approval specific to either the seller or the buyer? How would a captive insurer obtain preapproval for the assignment of a particular policy to any buyer?
3. Does the sale of a facility to a new owner or operator outside of the captive's corporate family automatically qualify that entity as a "controlled unaffiliated business" under Vermont's captive insurance regulations and statute? If not, how would insurance coverage be extended?

States waste officials and owners of waste facilities have requested that my office respond to the issues raised in the Inspector General's report. I look forward to reading your answers to our questions so that we can respond to the report's recommendations. If your staff should have any questions about our request, I hope that they will feel free to contact Dale Ruhter of our Permits Branch at (703) 308-8192, or ruhter.dale@epa.gov. Thank you for your help.

Sincerely,



Elizabeth Cotsworth, Director
Office of Solid Waste

Enclosures

²The language in 40 CFR 264.143(e)(7) is typical. "Each policy must contain a provision allowing the assignment of the policy to a successor owner or operator. Such assignment may be conditional upon the consent of the insurer, provided such consent is not unreasonably refused."



Vermont . . .

Department of Banking, Insurance,
Securities and Health Care Administration

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June 29, 2001

VIA UPS

Elizabeth Cotsworth, Director
Office of Solid Waste and Emergency Response
United States Environmental Protection Agency
Washington, DC 20480

Dear Ms. Cotsworth:

I write in response to your letter of June 19, 2001, to Mr. Leonard Crouse, Director of Captives, concerning captive insurance companies that provide closure and post-closure financial assurance. In general, we believe that our captive insurance programs as used for financial assurance purposes under RCRA regulations meet the intent of your regulations as you stated the intent to us in your letter.

Our answers to your specific questions must be read in the light of your pertinent observation that "[w]hile the regulations require that the new owner or operator obtain financial assurance for a hazardous waste facility, the regulations also require that the seller maintain financial assurance until the permitting authority accepts the financial assurance provided by the buyer. (See 40 CFR 270.40(b)). This ensures that there will be no lapse in coverage." We agree that, as a practical matter, the seller remains obligated until the transfer actually takes place. No buyer, it seems to us, is going to close on a sale without having a permit or the imminent prospect of a permit – and therefore its own financial assurance – already in place. The alternative for the buyer would be to spend money to own a landfill it might never be able to operate. By the same token, a seller would not want to continue to have closure and post-closure obligations on a property once the permit has been transferred to the new owner.

Moreover, 40 CFR 270.40(b) confirms the point: the seller remains on the risk until the permit is in place. Because the seller is on the risk, the seller must maintain financial assurance.

So, from the point of view of the captive, nothing has changed – its parent has an obligation, and the captive is insuring it. Thus there is no question of assignment: insurer and insured remain as before, until the buyer has provided its own financial assurance. (We might also note just for clarity that the parent, not the captive, is the primary source of funds for closure and post-closure expenses; the insurer is just that.)

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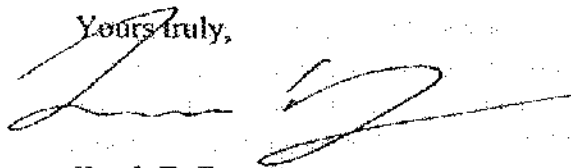
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7/3/01 *DR*

Because the issue posed by 40 CFR 270.40(b) and your letter does not involve assignment of a policy, the answers to your three questions appear not to matter. Briefly, however, the answer to your first question is that Vermont does not permit assignment of a pure captive insurer's policies.¹ As to your second question, it is moot as to pure captives, which may not assign the policy. As to "group captives" such as association captives, an assignment would not require approval of the Department, but clearly the captive would engage in an underwriting analysis before allowing the assignment and the distinction between the assignment and the issuing of a new policy would be slight.

The answer to your third question, whether the sale of a facility to a new owner or operator outside the captive's corporate family *automatically* qualifies the buyer as a "controlled unaffiliated business," is "no" but the issue behind that question -- is there continuous coverage -- is dealt with by 40 CFR 270.40(b), *i.e.*, the seller retains a coverage obligation until the buyer obtains a permit (and thus its own financial assurance). The seller's obligation is assured, as previously, by its policy with its captive insurer. Whether the buyer is inside or outside the corporate family or is or is not a controlled unaffiliated business does not affect the matter because the seller remains obligated and its method of providing assurance is unchanged.

We are reviewing the OIG report and if we have any comments will forward them to you.

Yours truly,



Frank D. Romano
Deputy Commissioner
Division of Insurance

¹ There are other kinds of captives, however, such as association captives, which insure the risks of the member organizations of the association, and their affiliated companies. If the buyer were a member of the association, the same captive could issue a closure and post-closure policy to the buyer as it had to the seller, though as a practical matter that would not be an assignment. There are other group forms as well, such as risk retention groups and industrial insured captives that insure the risks of industrial insureds that comprise an industrial insured group.